



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

DRAFT

Date Amended	06/07/04	Bill No:	SB 50
Tax:	Covered Electronic Waste Recycling Fee	Author:	Sher
BOE Position:		Related Bills:	AB 901 (Jackson)

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

Among other things, this bill would require the State of Equalization (BOE) to collect the covered electronic waste recycling fees on and after January 1, 2005.

Summary of Amendments

The previous version of this bill did not impact the BOE.

ANALYSIS

Current Law

Chapter 8.5 (commencing with Section 42460) to Part 3 of Division 30 of the Public Resources Code enacted the Electronic Waste Recycling Act of 2003 (the Act). Among other things, the Act imposes, **on and after July 1, 2004**, a covered electronic waste recycling fee upon the first sale in the state of a covered electronic device to a consumer by a retailer.

A retailer selling a covered electronic device to a consumer is required to collect a covered electronic waste recycling fee from the consumer for each covered device sold by the retailer in the following amounts:

- Six dollars (\$6) for each covered electronic device with a screen size of less than 15 inches measured diagonally.
- Eight dollars (\$8) for each covered electronic device with a screen size greater than or equal to 15 inches but less than 35 inches measured diagonally.
- Ten dollars (\$10) for each covered electronic device with a screen size greater than or equal to 35 inches measured diagonally.

The IWMB is authorized to collect the covered electronic waste recycling fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). However, the Integrated Waste Management BOE (IWMB) may contract with the BOE or another party for collection of the covered electronic waste recycling fee.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

Proposed Law**Collection and Administration**

This bill would amend the Act to require the collection of the covered electronic waste recycling fee in the following manner:

- On or before **November 1, 2004**, in consultation with the BOE, the IWMB would be required to issue a notice to each retailer who sells a covered electronic device that describes the retailer's obligations, as described, to register with, and collect and remit electronic waste recycling fees to the BOE. The notice would include all information the BOE deems necessary to ensure efficient and enforceable collection of electronic waste recycling fees. The IWMB would also be required to establish, on or before November 1, 2004, a call center for the purposes of responding to any inquiries or complaints from retailers or from the public concerning payment or collection of the electronic waste recycling fee.
- On and after **January 1, 2005**, the BOE would be required to collect electronic waste recycling fees from retailers and deposit those fees in the Electronic Waste Recovery and Recycling Account. The BOE would be authorized to collect the fees pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code. For purposes of the Fee Collection Procedures Law, the retailer would be deemed to be the feepayer, as defined.

The IWMB and the BOE would be required to share data and expertise to ensure the timely and efficient implementation of Section 42464.2.

The covered electronic waste recycling fee would be due and payable quarterly on or before the last day of the month following each calendar quarter. The payments would be accompanied by a return in the form as prescribed by the BOE, including, but not limited to, electronic media. The BOE would be authorized to require the payment of the fee and the filing of returns for other than quarterly periods.

The Electronic Waste Recovery and Recycling Account

This bill would continuously appropriate the funds in the Electronic Waste Recovery and Recycling Account, without regard to fiscal year, for the following purposes:

- To reimburse the BOE for its costs associated with registration, collection, overpayment refunds, and auditing retailers in connection with the covered electronic waste recycling fee.
- To make electronic waste recovery payments to an authorized collector of covered electronic waste.
- To make electronic waste recycling payments to covered electronic waste recyclers of covered electronic waste.
- To provide funding to the Department of Toxic Substances Control (DTSC) to implement and enforce Chapter 6.5 (commencing with Section 25100) of Division 20 of the Health and Safety Code, as that chapter relates to covered electronic devices, and any regulations adopted by the department pursuant to that chapter.
- To establish the public information program, as specified.

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Definitions

For purposes of the Act, this bill would revise and add definitions for the following terms:

- "Consumer" would mean a person who purchases a new or refurbished covered electronic device in a transaction that is a retail sale. "Consumer" would not include a manufacturer who purchases specialty or medical electronic equipment that is a covered electronic device.
- "Covered electronic device" would mean a cathode ray tube, cathode ray tube device, flat panel screen, or any other similar video display device with a screen size that is greater than four inches in size measured diagonally and which the DTSC determines, when discarded or disposed, would be a hazardous waste.

A "covered electronic device" would not include (1) an electronic device determined by the DTSC, pursuant to Section 25214.10.1 of the Health and Safety Code, to be non-hazardous, (2) a video display device that is a part of a motor vehicle, as defined, or any component part of a motor vehicle assembled by, or for, a vehicle manufacturer or franchised dealer, including replacement parts for use in a motor vehicle, or (3) a video display device that is contained within, or a part of a piece of industrial, commercial, or medical equipment, including monitoring or control equipment, and that is not separate from that equipment.

- "Person" would be defined to mean an individual, trust firm, joint stock company, business concern, corporation, including, but not limited to, a government corporation, partnership, limited liability company, and association. Notwithstanding Section 40170, "person" would also include a city, county, city and county, district, commission, the state or a department, agency, or political subdivision thereof, an interstate body, and the United States and its agencies and instrumentalities to the extent permitted by law.
- "Retailer" would mean a person who makes a retail sale of a new or refurbished covered electronic device in the state directly to a consumer through any means, including, but not limited to, a transaction conducted through a sales outlet, catalog, or the Internet or any other similar electronic means. "Retailer" would also include a manufacturer of a covered electronic device who sells that covered electronic device directly to a consumer through any means, including, but not limited to, a transaction conducted through a sales outlet, catalog, or the Internet, or any other similar electronic means.
- "Retail sale" would have the same meaning as retail sale is defined under Section 6007 of the Revenue and Taxation Code.

Miscellaneous

This bill would require, on or before May 1, 2005, and, thereafter, no more frequently than annually, and no less frequently than biennially, the IWMB, in collaboration with the DTSC, to review, at a public hearing, the covered electronic waste recycling fee and make adjustments to the fee to ensure that there are sufficient revenues in the account to fund the covered electronic waste recycling program established pursuant to the Act. Adjustments to the fee that are made on or before May 1 of the current calendar year would apply for the 12-month period of July 1 of the current calendar year to June 30 of the next succeeding calendar year.

This bill would also authorize the IWMB to reduce or eliminate the covered electronic waste recycling fee on a device if the manufacturer of that device demonstrates to the satisfaction of the DTSC that the device contains no toxic materials. The IWMB would not be obligated to refund electronic waste recycling fees collected prior to a determination that a device contains no toxic materials. In addition, such a determination would not relieve a retailer from paying an electronic waste recycling fee on a device sold prior to that determination.

Health and Safety Code Provisions

This bill would add Section 25214.10.1 to the Health and Safety Code to require the DTSC to adopt regulations that identify electronic devices that are **video display devices** with a screen size of greater than four inches that the DTSC determines are presumed to be, when discarded, hazardous waste.

Section 25214.10.1 would also allow the manufacturer of an electronic device, as specified, to apply to the DTSC for a determination that the device is non-hazardous, in accordance with procedures set forth in regulations adopted by the DTSC. If the DTSC determines that the electronic device is non-hazardous, the electronic device is not subject to the Act, including the covered electronic waste recycling fee, on the first day of the quarter that begins at least 30 days after the last date of the following required actions have occurred:

- The date when the DTSC provides a written statement to the manufacturer that the electronic device is non-hazardous.
- The date when the manufacturer notifies all retailers selling the electronic device of the DTSC's determination.

The bill would become effective January 1, 2005.

Background

In 2002, Senator Sher introduced Senate Bill 1523, which would have placed a \$10 advanced recycling fee on the sale of all new CRTs sold in California. Senate Bill 1523 passed both houses of the Legislature, but was vetoed by the Governor. In his veto statement, Governor Davis said he would rather see California legislation modeled after the product stewardship approach in the European Union, and that he was willing to sign legislation in 2003 that "challenges industry to assume greater responsibility for the recycling and disposal of electronic waste." The veto statement also stated: "I challenge the industry to lead the way and devise an innovative solution for the source reduction, recycling and safe disposal of electronic waste . . . Moreover, we simply must demonstrate our leadership and compassion by making sure that California's electronic waste is not irresponsibly sent to underdeveloped nations." In response to the Governor's challenge, Senator Sher introduced Senate Bill 20.

Senate Bill 20 (Sher, Ch. 526, Stats. 2003) enacted the Electronic Waste Recycling Act of 2003. Among other things, the Act imposes a covered electronic waste recycling fee upon the first sale in the state of a covered electronic device to a consumer by a retailer. The Act authorizes the IWMB to contract with the BOE or another party for collection of the fee, however, the BOE has not entered into a contract as of the date of this analysis.

COMMENTS

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to clarify certain terms, exemptions and reporting and fee requirements in the Act, and to mandate the BOE to collect the covered electronic waste recycling fee.
2. **The BOE could not administer a new fee program commencing on and after January 1, 2005, without substantial risk to its Revenue Database Consolidation (RDC) Project.** Since April 2004 and running through the remainder of the 2004 calendar year, the BOE is implementing the RDC project. The RDC project involves extensive changes to the Integrated Revenue Information System (IRIS), the BOE's primary tax administration system. The RDC project implementation and stabilization efforts will occupy significant BOE staff resources for the rest of 2004.

In addition, the BOE is currently in the process of developing, testing and implementing technology changes related to new legislatively mandated programs* enacted in 2002 and 2003. This effort has been included in the multi-year, multi-phase RDC project and will be on-going through the end of 2004.

Since this bill would require the BOE to collect the covered electronic waste recycling fee on and after January 1, 2005, programming to the BOE's computer system would be required at the end of 2004, which is during the final stages of the RDC Project. Making any modifications at the end of the system development would put the BOE's RDC project, including the programming for the new legislatively mandated programs, at substantial risk. Because of this risk, the BOE can not add a new tax or fee program to its system until early 2005. As such, the bill should be amended to revise the operative date for the fee from **July 1, 2004** to **January 1, 2005** with the first return and fee payment due and payable **April 30, 2005**.

3. **This bill should contain a specific appropriation to the BOE.** This bill proposes that the BOE collect a fee on and after January 1, 2005, which is in the middle of the state's fiscal year. In order to properly notify feepayers, develop computer programs, reporting forms, and hire appropriate staff, an adequate appropriation would be required to cover the BOE's administrative start-up costs that would not already be identified in the BOE's 2004-05 budget.
4. **The BOE would require the necessary funding to administer the covered electronic waste recycling fee.** In funding state agencies, the Administration and the Legislature have not provided budget dollars to support the actual agency payroll costs (for example, workers compensation costs, merit salary adjustments, and collective bargaining requirements are not fully funded in the annual budget process). The Administration and the Legislature expect state agencies to keep positions vacant or delay hiring staff in order to save dollars to meet these unfunded payroll costs.

To be able to promptly hire staff or to recruit from outside the BOE's operations, the bill should be amended to provide funding to fully support the actual costs of a position if it is anticipated that the Office would contract with the BOE to collect the proposed fee.

5. **Duplicative responsibilities.** This bill would require, on or before November 1, 2005, the IWMB (in consultation with the BOE) to issue a notice to affected retailers

* to SB 1049 (Water Rights Fee), AB 71 (Cigarette and Tobacco Products Licensing Act), and SB 1701 (Alternative Cigarette and Tobacco Stamps)

regarding their obligation to register, collect and remit the fee to the BOE. The IWMB would also establish a call center for the purposes of responding to inquiries regarding the registration, payment or collection of the fee.

BOE staff is concerned that it would be costly and duplicative to have the IWMB commence a new fee program only to have it taken over by the BOE within two months. In addition, BOE staff has serious concerns that the IWMB may not capture all fee payers, which could result in the BOE inheriting a program with incomplete registration information.

6. **Could the state require out-of-state retailers to remit a covered electronic waste recycling fee?** Various Supreme Court cases have focused on states' ability to impose the use tax on out-of-state firms making sales to in-state customers. In 1967 the Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), that a firm that has no link to a state except mailing catalogs to state residents and filling their orders by mail cannot be subject to that state's sales or use tax. The Court ruled that these mail order firms lacked substantial physical presence, or nexus, required by the Due Process Clause and the Commerce Clause of the United States Constitution.

In the 1977 case of *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 {51 L.Ed.2d 326, 97 S.Ct. 1076} the Court articulated that, in order to survive a Commerce Clause challenge, a tax must satisfy a four part test: 1) it must be applied to an activity with a substantial nexus with the taxing State, 2) it must be fairly apportioned, 3) it does not discriminate against interstate commerce, and 4) it must be fairly related to the services provided by the State.

North Dakota enacted anti-National Bellas Hess legislation with the expressed purpose of creating nexus with mail order firms selling to consumers in the state, in an attempt to compel out-of-state retailers to collect the use tax on mail order sales and test the continuing validity of the National Bellas Hess decision. The statute was challenged, and in 1992 the Supreme Court issued a ruling in *Quill Corporation v. North Dakota* (1992) 504 U.S. 298. The Court in *Quill* applied the *Complete Auto Transit* analysis and held that satisfying due process concerns does not require a physical presence, but rather requires only minimum contacts with the taxing state. Thus when a mail-order business purposefully directs its activities at residents of the taxing state, the Due Process Clause does not prohibit the state's requiring the retailer to collect the state's use tax. However, the Court held further that physical presence in the state was required for a business to have a "substantial nexus" with the taxing state for purposes of the Commerce Clause. The Court therefore affirmed that in order to survive a Commerce Clause challenge, a retailer must have a physical presence in the taxing state before that state can require the retailer to collect its use tax.

Based on the above cases, it is questionable whether the state could require an out-of-state retailer of a covered electronic device, who has no physical presence in California, to remit a fee in order for that device to be sold to a consumer in this state. Further, it should be noted that this bill would define a "retailer" to mean a person who sells a covered electronic device in this state. Based on that definition, it is unclear if the restrictions would apply to an out-of-state retailer that has no physical presence in the state, since without a physical presence it is possible that a

sale of the device that ends up in California would not have been made by the retailer in this state.

7. **The July 1, 2004 operative date.** This bill would not change the July 1, 2004, operative date for the covered electronic waste recycling fee. The bill would, however, make the first return and fee payment due and payable October 31, 2004. Since the IWMB would not have any requirement to collect the fee, and the BOE's collection responsibilities would not begin until January 1, 2005, it is not clear to whom the initial payment for the fees would be made.
8. **Other administrative concerns.** BOE staff has provided the author's office with appropriate amendments to address several administrative concerns, including, but not limited to, the following:

- **Section 25214.10.1(d)** would authorize the DTSC to determine an electronic device as non-hazardous. Such a device would not be subject to the Act, including the covered electronic waste recycling fee on the first day of the quarter that begins at least 30 days after the last date of the following required actions have occurred:

1. The date when the DTSC provides a written statement to the manufacturer that the electronic device is non-hazardous.
2. The date when the manufacturer notifies all retailers selling the electronic device of the DTSC's determination.

It is not clear how the BOE would know when these actions have occurred. As such, the BOE would not know when the electronic device deemed non-hazardous is no longer subject to the covered electronic waste recycling fee.

- **Section 42463** should be amended to add definitions for the terms "refurbished," "cathode ray tube or cathode ray tube device," "liquid crystal display desktop monitor", "a laptop computer," and "industrial, commercial, or medical equipment."
- **Section 42463(d)(2)(A)-(C)**, which provides what is not included within the definition of "consumer", appears unnecessary. If it is the author's intent to exclude the specified equipment from the covered electronic waste recycling fee, the bill should be amended to exclude such equipment from the definition of "covered electronic device".
- **Section 42463(q)** would define the term "retailer." In its current form, the definition is repetitive, contradictory and could be confusing to fee payers.
- **Section 42464** should require the retailer to separately state the covered electronic waste recycling fee. This is necessary for the efficiency of both sales and use tax, and covered electronic waste recycling fee, audits.
- **Section 42464(d)(1)-(2)** would allow the IWMB to reduce the covered electronic waste recycling fee, as specified. Also, the IWMB would not be required to refund the covered electronic waste recycling fee prior to that determination. Reducing the fee on a specific electronic device would complicate a retailer's collection of the fee, as well as the BOE's administration of the fee program.
- **Section 42476(a)** would not allow for the payment of refunds for overpayments of the covered electronic waste recycling fee.

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9. **Related legislation.** Assembly Bill 901 (Jackson) would revise the operative date of the covered electronic waste recycling fee from July 1, 2004 to November 1, 2004. The bill would take effect immediately as an urgency statute.

COST ESTIMATE

The BOE would incur substantial non-absorbable costs associated with the workload to adequately develop and administer a new fee program. This workload would include notifying and registering fee payers, developing computer programs, mailing and processing returns and payments, carrying out compliance and audit efforts to ensure proper reporting, developing regulations, training staff, and answering inquiries from the public. A cost estimate of this workload is pending.

A cost estimate of the new workload is pending. However, for perspective, the BOE completed a preliminary cost estimate based on the amendments provided to the author, which would:

- Make the fee operative January 1, 2005, with the due date for the first return and payment of the fee April 30, 2005.
- Require the BOE to collect the fee.
- Delete IWMB responsibilities to issue a notice to affected retailers (including, but not limited to sending out applications and performing any registration functions) and to establish a call center.

These costs were estimated to be as follows:

<u>2004-05</u>	<u>2005-06</u>
\$4,157,000	\$5,705,000

REVENUE ESTIMATE

This measure would not impact state revenues.

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